UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

CHAPEL 25 HOTEL ASSOCIATES LP
d/b/a HAMPTON INN & SUITES
ALBANY DOWNTOWN[1]

Employer-Petitioner

and **Case 3-RM-788**

LOCAL 471 UNITE HERE

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, I find:

[1] The Employer-Petitioner's name appears as amended at the hearing.
[2] The Employer-Petitioner's motion to correct typographical errors in the transcript is hereby granted in the absence of any opposition from the Union.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

2. The parties stipulated that Chapel 25 Hotel Associates, LP d/b/a Hampton Inn & Suites Albany Downtown, hereinafter referred to as the Employer, is a New York State corporation with offices and a principle place of business located in Albany, New York, where it is engaged in the operation of a hotel. In the first six months of operation, since beginning operations in October 2005, the Employer has realized revenues in excess of $500,000 and purchased and received goods and services valued in excess of $10,000 from points located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Local 471 UNITE HERE, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. There is no question affecting commerce concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

At the hearing, the Employer amended its petition to include all full-time and regular part-time employees, including all housekeeping, maintenance, front desk and breakfast

[3] At the hearing, the Employer-Petitioner filed a special appeal, objecting to the hearing officer's ruling excluding testimony sought by the Employer-Petitioner from a Union witness concerning the Union's dealings with other employees. The Employer-Petitioner sought to ask questions about other employers for two reasons: 1) to attack the credibility of the Union's witness as it relates to prior testimony, wherein she testified that she has never asked another employer to recognize the Union without first obtaining majority support from the employees; and 2) to establish that the Union was not picketing other non-union employers in downtown Albany, New York. I find no prejudicial error in the hearing officer's ruling. In making this determination, I initially point out that credibility is not an issue in representation hearings. Moreover, questions regarding other employers, which do not include or relate to the instant Employer-Petitioner, are not relevant or dispositive of the sole issue herein of whether there was a present demand for recognition made to this Employer-Petitioner. Finally, I conclude that the record is complete inasmuch as there is no record testimony that the Union was picketing other non-union employers in downtown Albany, and because such is irrelevant to the issues pending herein.

employees employed by the Employer at its Albany, New York facility; excluding the night auditor, all guards, office clerical employees, supervisors and professional employees as defined in the Act.[4] The Employer stated that it is willing to proceed to an election in any unit found appropriate. The Union did not take a position on the appropriateness of the petitioned-for bargaining unit.

At issue is whether the Union made a present demand for recognition within the meaning of Section 9(c)(1)(B) of the Act. The Employer takes the position that the Union made such a demand for recognition, sufficient to satisfy Section 9(c)(1)(B) of the Act. The Union contends that there is no present demand for recognition and requests that the instant petition be dismissed since no question concerning representation exists.

Based on the evidence adduced during the hearing and the relevant case law, I conclude that at no time has the Union made a request, demand or "claim" for recognition within the meaning of Section 9(c)(1)(B) of the Act. Since no question concerning representation exists, the present petition shall be dismissed.

FACTS

The Employer operates a Hampton Inn & Suites, hereinafter referred to as the Hotel, in downtown Albany, New York. The Hotel is a 165-room hotel with 121 standard rooms and 44 suites. The Hotel also has approximately 2600 square feet of meeting space, an exercise room and a relaxation room. There are two restaurants inside the Hotel, Yono's and D.P. American Brasserie, which are both owned and operated by Wine and Dine Group, LLC. The record establishes that Wine and Dine Group, LLC is owned by Donna Purnomo, who leases the restaurant space inside the Hotel from the Employer. The record further shows that there is no

[4] There are approximately 36 employees in the petitioned-for unit, consisting of 25 housekeeping employees, 2 maintenance employees, 7 front desk employees and 2 breakfast employees.

other relationship between the Employer and Wine and Dine Group, LLC, such as common ownership, other than the lessor-lessee relationship.

The Hotel's general manager is Michael Gulotty. Gulotty is responsible for overseeing all Hotel services and is also responsible for the financial and fiduciary activities of the Hotel. Gulotty reports to Michael Harrell, the chief executive officer for Vista Host, Inc., which is the management company for the Employer. As the Employer's management company, Vista Host, Inc. is responsible for hiring, firing and directing the work of the Hotel's top management. It also provides the Hotel with support services, such as accounting and computer support. Harrell is based in Houston, Texas.

The Union represents employees at local hotels in the Albany, New York area. Theresa Hammer is the Union's president and has held this elected position for approximately 13 years. Hammer is responsible, in part, for Union organizing and the servicing of various collective-bargaining agreements between the Union and local employers.

The Hotel's grand opening was held on October 20, 2005. The record establishes, however, that the earliest meeting between representatives of the Employer and the Union occurred in June 2005. At that time, Harrell and Hammer met in a construction trailer located on the Hotel's property. Harrell testified that, at the time of the meeting, the Hotel construction was 70 percent complete.

Hammer testified that she initiated this meeting because she wanted to introduce herself, and the Union, to Harrell. Hammer informed Harrell that the Union represented employees at other hotels in downtown Albany and that the Union could provide business to the Hotel. During this meeting, Hammer asked Harrell if he was familiar with neutrality agreements and

went on to explain the concept of such agreements.[5] Harrell testified that his response to Hammer was that the Employer was trying to get the Hotel opened and that he was not going to make any decision at that time about a neutrality agreement.

A second meeting was held between Harrell and Hammer, sometime prior to the Hotel's grand opening. According to Hammer, this meeting consisted mostly of a tour of the Hotel. Harrell testified that during the meeting, Hammer asked him whether the Hotel was ready to sign a neutrality agreement, to which Harrell responded that he was still trying to get the Hotel opened. Hammer testified that she could only recall telling Harrell that she would like to have a union shop at the Hotel, but asserts that they did not discuss the method by which this would be accomplished.

The next contact between representatives of the Employer and the Union occurred on October 20, 2005. Hammer, who was an invited guest at the Hotel's grand opening, met with General Manager Gulotty. Gulotty testified that the general substance of their conversation was that the Union "should" represent employees at the Hotel, like they did at other downtown properties. If not, the Hotel would be the only downtown property where employees were not represented by the Union. Gulotty testified that during their conversation, Hammer stated that "we can either do this the easy way or the hard way." However, Gulotty further testified that Hammer did not specify what she meant by the easy or hard way. Gulotty also testified that Hammer asked him to have Harrell sign a neutrality agreement.

Hammer testified that her conversation with Gulotty on October 20, 2005, was brief and that she did not demand recognition during the conversation. At the hearing, Hammer could not remember asking Gulotty to have Harrell sign a neutrality agreement. Hammer also testified that

[5] A neutrality agreement, also known as a labor peace agreement, is an agreement whereby an employer agrees that, during a union's organizational campaign, it will remain neutral and not express opposition to its employees' selection of union representation.

although she was not sure, it was possible that she told Gulotty that we can do it the "easy way or the hard way." Hammer testified that had she made that comment, she was referring to a neutrality agreement as being the easy way.

The following day, October 21, 2005, Hammer had a brief conversation with Harrell, before he returned to Texas. Hammer testified that Harrell informed her that he was no longer interested in pursuing any dialogue with the Union. Hammer responded that "its too bad."

There was no contact between the parties from October 2005 until May 7, 2006.[6] The Employer presented testimony of conversations between Donna Purnomo, the owner of Wine and Dine Group, LLC, and Theresa Hammer. Purnomo testified that on April 18 and 19, 2006, she had conversations with Hammer, in which Hammer stated that the Union "would like to represent the restaurant employees, as well as the Hotel employees." Purnomo testified that there were no other conversations with Hammer about the Hotel employees. At the hearing, the Employer took the position that Purnomo is not an agent of the Employer. Hammer denies that she spoke to Purnomo about Hotel employees.

On May 7, 2006, the Union began picketing on the streets surrounding the Hotel.[7] The record establishes that the picketing has continued to date, with pickets present six days a week. The record establishes that on the first day of picketing, there were approximately 40 pickets, and on subsequent days there have been approximately 1 to 6 pickets. Hammer testified that the Union's picket signs state, "To the public, please do not patronize the Hampton Inn and Yono's. Hampton Inn and Yono's do not have a labor agreement with Local 471. We do not intend for

[6] Gulotty testified that in December 2005, at a tree lighting ceremony, he was approached by the Mayor of Albany and a conversation about the Union ensued. The Mayor informed Gulotty that he had heard that the Union had "targeted" the Employer. Gulotty testified that the Mayor asked him to call the Union and try to "work it out." The Employer acknowledges that the Mayor of Albany is not an agent of the Union. Gulotty further testified that the Mayor of Albany never told him to recognize the Union or sign a contract with the Union.

[7] May 7, 2006 was also the grand opening celebration for Yono's, one of the restaurants inside the Hotel, which is owned and operated by Wine and Dine Group, LLC.

any of the public to not go into the facilities, we ask that there be no work stoppages." The picket signs also stated that the Union was not requesting that the Employer recognize the Union as the representative of its employees.

The record shows that Gulotty and Hammer had a brief conversation on May 7, 2006, outside the hotel near the picket line. Gulotty testified that Hammer spoke about how successful the Union has been and that the Employer's employees "should" be represented. He testified that Hammer said that if the Hotel had "an agreement signed,"[8] the picketing would stop. Gulotty also testified that Hammer said that any such agreement would apply to all restaurant and Hotel employees.

Hammer testified that during her conversation with Gulotty on May 7, she informed him of her conversations with Michael Harrell in 2005, and told Gulotty that she had tried to get a neutrality agreement with Harrell but that this dialogue had fallen apart.

On June 2, 2006, Hammer telephoned Gulotty seeking his input on how to get past the parties' impasse. Both Hammer and Gulotty provided similar testimony about their conversation. Gulotty informed Hammer that the Employer was going to petition for an employee vote because the Employer believes that the Union demanded recognition. Hammer immediately responded that the Employer could not do that since the Union did not demand recognition. Hammer testified that Gulotty responded that the Union's picket line is a demand for recognition. Hammer responded that the pickets clearly state that the Union was not seeking recognition from the Employer, but what the Union was doing was seeking a neutrality agreement. Gulotty testified that Hammer did not ask him to sign a recognitional agreement and he is "not in that position, anyways."

[8] No specific type of agreement was discussed.

The record establishes that the final contact between the Employer and the Union occurred on June 5, 2006, when Hammer telephoned Gulotty. Hammer testified that the purpose of her call to Gulotty was to ask him whether the Union should stop picketing, in the spirit of getting dialogue started again with Harrell, who was expected to travel to Albany to visit the Hotel. However, according to Hammer this conversation did not resolve the matter and the Union continued to picket.

Finally, at the hearing, Gulotty testified that at no time did Hammer claim that the Union represented the Hotel employees. Gulotty further testified that no written contract or collective-bargaining agreement was ever provided to the Employer.

ANALYSIS

The Board has consistently construed Section 9(c)(1)(B) of the Act as requiring evidence of a union's "present demand for recognition" as a majority representative of the employer's employees before the employer's petition will be processed. See New Otani Hotel & Garden, 331 NLRB 1078 (2000); Windee's Metal Industries, 309 NLRB 1074 (1992). A present demand for recognition may be expressed in a variety of ways, including verbal and written communications, picketing and demonstrations. See, e.g., Rusty Scupper, 215 NLRB 201 (1974); Holiday Inn of Providence—Downtown, 179 NLRB 337 (1969). The Board has also found that a demand for recognition may also be established if a union informs an employer that its picketing would cease if the employer signs a contract with the union. See Windee's Metal Industries, supra; Robert Tires, 212 NLRB 405 (1974). However, informational picketing, without more, is not sufficient to establish a present demand for recognition. See New Otani Hotel & Garden, supra at 1079; Windee's Metal Industries, supra at 1075. The Board must examine the facts surrounding the picketing to determine whether, "in the context of other related events it

appearsthat an object of the picketing is to press upon the employer a demand for immediate recognition." Capitol Market No. 1, 145 NLRB 1430, 1431 (1964). In an RM proceeding, the burden is on the employer to establish that a request for recognition has been made. See Brylane, LP, 338 NLRB 538, 542 (2002) (Board declined to grant review of Regional Director's Decision that a union's request for a neutrality and card check agreement did not constitute a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act.).

I conclude that there is insufficient evidence to find that the Union made a present request, demand or claim for recognition within the meaning of Section 9(c)(1)(B) of the Act. The record establishes that the Union requested that the Employer sign a neutrality agreement. However, the Board has consistently found that such a request does not constitute a present demand for recognition. See New Otani Hotel & Garden, supra at 1080-1081. See also Brylane, L.P., supra.

The facts in New Otani Hotel & Garden, supra, appear analogous to the facts in the instant case. There, the Board affirmed a Regional Director's dismissal of an RM petition on grounds that no request for recognition had been made upon the employer. In New Otani Hotel & Garden, the union had engaged in informational picketing and urged a boycott of the employer's hotel for four years. Similar to the instant case, the union had also requested that the employer enter into a neutrality/card-check agreement. The Board rejected the employer's assertion that picket signs which said that the hotel "does not have a contract" with the union and "has substandard working conditions" constitute a demand for recognition. The Board reiterated the rationale for Section 9(c)(1)(B)'s enactment:

> Thus, the Act contemplates that a union which is not presently majority representative may decide when or whether to test its strength in an election by its decision as to when or whether to request recognition or itself petition for an election. Id. at 1079, citing Albuquerque Insulation Contractor, 256 NLRB 61, 63 (1981).

As noted above, informational picketing, without more, is not sufficient to establish a present demand for recognition. New Otani Hotel & Garden, supra; Windee's Metal Industries, supra. In the instant case, the Union's picket signs inform the public that the Employer does not have a labor agreement with the Union. Hammer also provided uncontradicted testimony that the picket signs state that the Union is not requesting recognition from the Employer. Gulotty further admitted that the Union never claimed that it "did" represent the Hotel's employees and never asked him to sign a recognition agreement.

The Employer, in its post-hearing brief, asserts that Hammer's statements support a conclusion that the Union made a present demand for recognition. The Employer relies on the fact that Hammer contacted various members of the Hotel's management and Wine and Dine Group's owner, about wanting to represent employees at the Hotel. The Employer also refers to Hammer's comment to Michael Harrell, during their second conversation, where Hammer stated that she would like to have a union shop at the Hotel. Finally, the Employer cites to Hammer's offer on June 5, 2006, to stop picketing if Gulotty thought the Union would make more headway with Harrell.

In Windee's Metal Industries, supra at 1075, the employer's president testified that he had construed the union's picketing as a demand for recognition because, "Presumably, if I sign a contract with [the union], the job will be done by members of [the union] and the picketing will cease." The Board concluded that nothing in any testimony had suggested that the union had presented a claim for recognition within the meaning of Section 9(c)(1)(B) and declined to find such a claim based on the employer's "supposition concerning the likely outcome of events." The Board also stated that "[i]t would be inconsistent with the language and legislative intent of Sec[tion] 9(c)(1)(B) to find that…informational picketing, [is] sufficient to allow an employer to

petition for an election merely because an objective of the activity may be to obtain eventual recognition." Windee's Metal Industries, supra at 1075 fn. 5. Similarly, here, the Union's contacts with Employer and Wine and Dine management, the Mayor of Albany's suggestion that the Employer contact the union to resolve the dispute, and Hammer's statement that she would like to have a union shop at the Hotel, are insufficient to establish a present demand for recognition, but rather evince a permissible objective of obtaining eventual recognition.

The Employer, in its post-hearing brief, relies on Gulotty's testimony that Hammer, on May 7, told him that if the Employer signed an agreement, the picketing would stop. The Employer also cites to two Board decisions, McClintock Market, Inc., 244 NLRB 555 (1979) and Ogden Enterprises, Ltd., 248 NLRB 290 (1980), in support of its contention that Hammer's May 7 statement constituting a present demand for recognition. The Board found, in both of the cited cases, that there was strong evidence of the unions' recognitional objective, when, during picketing that the unions had claimed was informational, the unions demanded that the employers sign a contract to end the picketing.[9] In neither case was there any evidence that the unions were seeking a neutrality agreement.

In the instant case, unlike McClintock Market and Ogden Enterprises, the Union was seeking a neutrality agreement from the Employer. Moreover, unlike the above-cited cases, there is no clear evidence establishing the recognitional objective. In fact, the picket signs specifically stated there was no such objective. While Gulotty testified that Hammer had stated on May 7 that the picketing would cease if the Hotel "had an agreement signed," Gulotty

[9] In McClintock Market, the Board noted that the union did not appear at the hearing and, thus, the employer's testimony was uncontradicted. The Board further noted that the purported area standards objective of the union's picketing was undermined by the lack of evidence that the union had ever investigated the employer's wage scale or employment conditions. In Ogden Enterprises, the Board, in concluding that the union had a recognitional objective, noted that there was no dispute that the union, when asked by the employer if the picketing would end if the employer and the union negotiated a contract, had informed the employer that it would. Id. at 390.

admitted at the hearing that that Hammer did not ask him to sign a recognitional agreement. Nor is there any testimony that Hammer specifically requested that the Employer negotiate or sign a collective-bargaining agreement. In all other meetings between the parties, the record establishes that the Union was seeking a neutrality agreement from the Employer, not a recognition agreement or a collective-bargaining agreement. In the context of these other conversations, Hammer's request on May 7 that the Employer sign an agreement, is insufficient to establish that she was referring to a recognition or collective-bargaining agreement, rather than a neutrality agreement.

Finally, Gulotty's further testimony, that Hammer stated on May 7 that the agreement should apply to both the Hotel and restaurant employees, is insufficient to establish a recognitional objective, as such a statement is ambiguous, as it could refer to the neutrality agreement that the Union had repeatedly sought. Thus, I conclude that, given all the circumstances herein, there is insufficient evidence to conclude that the Union made a present demand for recognition on the Employer..

CONCLUSION

No question concerning representation among employees covered by the petition exists because there has been no present demand for recognition by the Union.

ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **August 18, 2006**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

DATED at Buffalo, New York this 4th day of August, 2006.

/s/Helen E. Marsh

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